The Benefits of Departure Obsolescence: Achieving the Purposes of Sentencing in the Post-*Booker* World

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"Before turning to the facts of this case, we pause to comment on the state of the law since Booker. *Achieving agreement between the circuit courts and within each circuit on post-*Booker *issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow. The courts have particularly struggled to—and often failed at—properly applying the remedial portion of* Booker *along with the remedy. One murky area is what to do about the pre-*Booker *concept of 'departures' under the Guidelines now that the Guidelines are merely advisory. This Circuit is not exempt from causing confusion in this area."*[1]

I. INTRODUCTION

On June 5, 2007 Lewis "Scooter" Libby was sentenced to thirty months in prison for perjury and obstruction of justice.[2] On July 2, President Bush commuted Libby's prison sentence because he felt thirty months was "excessive."[3] If only receiving a reduced sentence were so easy.

The truth is, many people feel the way President Bush did—perhaps not that Mr. Libby deserved leniency, but that in general, the U.S. Sentencing Guidelines (Guidelines) produce a range of sentences that are too long.[4]

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[1] United States v. McBride, 434 F.3d 470, 474 (6th Cir. 2006).

[2] Neil A. Lewis, *Libby Receives 30 Months in Prison in C.I.A. Leak Case*, N.Y. TIMES, June 5, 2007, http://www.nytimes.com/2007/06/05/us/05cnd-libby.html.

[3] Statement by the President on Executive Clemency for Lewis Libby, http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html (last visited Feb. 7, 2008) (noting that commuting the entire thirty-month prison sentence but leaving the fine and felony conviction in place still constituted a "harsh punishment for Mr. Libby").

[4] *See, e.g.*, Carissa Byrne Hessick, *Prioritizing Policy Before Practice After* Booker, 18 FED. SENT'G REP. 167, 168 (2006) (noting voters often support long sentences in the abstract, but feel a shorter sentence is appropriate when informed of a case's unique facts); *see also* PETER H. ROSSI & RICHARD A. BERK, A NATIONAL SAMPLE SURVEY: PUBIC OPINION ON SENTENCING FEDERAL CRIMES 81 (1995), *available at* http://www.ussc.gov/nss/jp_ch5.pdf (noting a distinct lack of public support for long drug sentences).

What is striking about President Bush's stated justification for commuting Libby's within-guidelines sentence (that it was "excessive") is that the reasoning defies the present caselaw. Not one published appellate court decision has declared a within-guidelines sentence to be substantively unreasonable (i.e. "excessive") in the entire post-*Booker* era.[5]

This is not surprising considering that the Guidelines were largely created to check judicial discretion that many felt had run amok.[6] Still, Congress envisioned that the United States Sentencing Commission (Commission) would create guidelines that also "maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[7] As a result, the Commission crafted the Guidelines with a departure mechanism to give judges discretion to increase or decrease a sentence.[8] Although the authority to depart was limited to rare cases,[9] the departure concept symbolized that the Guidelines would not always be rigid and inflexible.

However, between 1987 and 2005, the Guidelines were largely rigid and inflexible. If the Guidelines had worked flawlessly, this would not have been a problem. But the reality was that judges were not invoking their departure authority even when doing so would create a more appropriate sentence. The result was that the pendulum had swung from a system of unfettered judicial discretion prior to the Guidelines to a system of virtually zero discretion under the mechanical application of the mandatory Guidelines. Departures should have been a vehicle for courts to fashion sentences that appropriately reflected the purposes of punishment when the Guidelines calculation failed

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[5] *See Morning Edition: Sentencing Experts Perplexed by Libby Commutation* (NPR radio broadcast July 12, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=11903743. And of course this defies the reality that the Department of Justice has consistently argued for within-guidelines sentences for defendants (presumably because they believe them *not* to be "excessive"). It should be noted, however, that an unpublished opinion from the Ninth Circuit declared a sixteen-month sentence for theft substantively unreasonable in *United States v. Paul*, 239 F. App'x 353, 354 (2007). Professor Doug Berman believes—and I have found nothing to the contrary—that this is the only opinion of its kind since *Booker*. Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2007/week33/index.html/ (Aug. 17, 2007, 13:54 EST).

[6] *See* discussion *infra* Part II.B.

[7] 28 U.S.C. § 991(b)(1)(B) (2000).

[8] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 4(b) (2006) [hereinafter SENTENCING GUIDELINES or USSG when citing a specific provision) ("When a court finds an atypical case . . . the court may consider whether a departure is warranted.").

[9] *Id.* ("[D]espite the courts' legal freedom to depart from the guidelines, they will not do so very often.").

to do so, but this did not occur.[10] In fact, it is fair to say that departures could have provided enough flexibility within the Guidelines framework to save the Guidelines—but that was not the case.

In 2005, the Supreme Court declared that the mandatory application of the Guidelines was unconstitutional.[11] *Booker* held that increasing a sentence based on facts found by a judge by the preponderance of the evidence, rather than found by the jury beyond a reasonable doubt, violated a defendant's Sixth Amendment rights.[12] Rather than abandoning the Guidelines, *Booker* fixed the constitutional problem by rendering the Guidelines "advisory" instead of mandatory.[13] Still, *Booker* commanded "judges to take account of the Guidelines together with other sentencing goals"—specifically those listed in 18 U.S.C. § 3553(a).[14]

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[10] *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 65–69 (2000).

[11] United States v. Booker, 543 U.S. 220, 227 (2005).

[12] *Id.* at 226–27.

[13] *Id.* at 245.

[14] *Id.* at 259–60. Section 3553(a) states:

> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
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> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
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> (2) the need for the sentence imposed—
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> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> (B) to afford adequate deterrence to criminal conduct;
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> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
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> (3) the kinds of sentences available;
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> (4) the kinds of sentence and the sentencing range established for—
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> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .
>
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States

Since *Booker*, the Supreme Court has decided three major sentencing cases that have clarified its meaning.[15] What is clear is that *Booker* fundamentally altered the approach the district court must take in sentencing a defendant. First, § 3553(a) is unquestionably the focus when sentencing. Second, district court judges now have greater discretion to do what they do best: judge. This means that they now have the discretion to fashion an appropriate sentence that was lacking under the mandatory Guidelines framework.

This renewed focus on § 3553(a) is significant because many of the decisions to depart prior to *Booker* made no mention of why increasing or decreasing a sentence would more appropriately reflect the purposes of punishment. And while many courts now look to § 3553(a) factors when deciding whether to grant a reduced sentence or not, the vast majority of circuits require calculating the Guidelines and then calculating applicable departures as was done prior to *Booker*.[16] In practice, this is a three-step process where the sentencing judge: (1) calculates the applicable guideline range; (2) calculates any applicable departures from that guideline range; and (3) determines whether to follow this sentence or vary from it based on § 3553(a) factors.[17] But this approach ignores the fact that *Booker*

> Code, taking into account any amendments made to such guidelines or policy statements by act of Congress . . .
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> (5) any pertinent policy statement . . .
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
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> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2000 & Supp. 2003).

[15] *See* Gall v. United States, 128 S. Ct. 586, 596 (2007) (rejecting proportionality review because it essentially applies "a heightened standard of review to sentences outside the Guidelines range," which is at odds with the proper abuse of discretion standard); Kimbrough v. United States, 128 S. Ct. 558, 570 (2007) (noting that § 3553(a) "contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing" and that while the Guidelines must be considered, *Booker* clearly enables district courts to "tailor" sentences with other considerations in mind); Rita v. United States, 127 S. Ct. 2456, 2462–63, 67 (2007) (holding that while an appellate court may apply a presumption of reasonableness to a within-Guidelines sentence, that presumption is not binding, and a presumption of unreasonableness for sentences outside the Guidelines is unacceptable).

[16] The First, Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits all require calculating applicable departures as part of consulting the Guidelines. *See infra* Part IV.B.1.

[17] *See* Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2005/02/departures_vari.html (Feb. 17, 2005, 2:50 EST) (noting this approach was advocated by judges and Sentencing Commissioners at Commission

fundamentally altered the sentencing process. *Rita*, *Gall*, and *Kimbrough* make clear that post-*Booker*, district courts have enhanced judicial discretion to vary a sentence in step three. This Note proposes that the post-*Booker* concept of "variances" is far superior to the departure mechanism. As a result, departures (and step 2 above) should be recognized for what they've become: obsolete.[18]

Reform could occur by more courts declaring departures obsolete with *Booker*, *Rita*, *Gall*, and *Kimbrough* as support. Yet the Commission should tackle this issue as it is one requiring substantive reform. Indeed, the Commission has shown commitment towards reform in the past year by amending the penalties for crack cocaine offenses and recommending that Congress provide a "comprehensive solution to the 100-to-1 drug quantity ratio" that results in extremely harsh punishment for crack cocaine offenders.[19]

With this in mind, this Note recommends that the Commission revisit the entire concept of departures and declare them obsolete. The abandonment or "obsolescence" of departures would have several salient benefits. First, one of the most common refrains for why the departure framework must be maintained—that pre-*Booker* departure jurisprudence "informs" sentencing decisions today—carries little, if any weight because pre-*Booker* sentencing decisions were largely devoid of § 3553(a) analysis. Abandoning departures will properly re-focus the inquiry on the purposes of punishment found in § 3553(a). Second, the Feeney Amendment debate shows that there never was a strong consensus regarding the viability or desirability of the departure

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hearings in the month following *Booker*); *see also* United States v. Gunter, 462 F.3d 237, 247 (3d Cir. 2006) (explicitly laying out the three-step process).

[18] The Seventh Circuit has done exactly that, declaring departures "obsolete" in *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005). The Ninth Circuit, although less categorical in its language, has also noted that this second step of calculating departures from the Guidelines is "redundant." *United States v. Mohamed*, 459 F.3d 979, 986 (9th Cir. 2006). These two decisions are discussed further in Part IV.B.2, but it is worth noting here that both decisions and their progeny do not offer much substantive guidance or substantive justification for departure obsolescence. Therefore, while this Note similarly advocates that departures are now obsolete, the purpose of this Note is to illustrate the substantive benefits of discarding the departure concept.

[19] *See* News Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Sex Offenses, Intellectual Property Offenses, and Crack Cocaine Offenses (Apr. 27, 2007), *available at* http://www.ussc.gov/PRESS/rel0407.htm. Congress had until November 1, 2007 to prevent the Commission's amendments from taking effect but did nothing. "As a result, up to 4 in 5 people found guilty of crack-cocaine offenses will [now] get sentences that are, on average, 16 months shorter than they would have been under the former guidelines." Alexandra Marks, *More Equity in Cocaine Sentencing*, CHRISTIAN SCI. MONITOR, Nov. 2, 2007, at 1, *available at* http://www.csmonitor.com/2007/1102/p01s02-usju.htm.

mechanism in the first place.[20] Because pre-*Booker* departure jurisprudence is confusing at best, and incoherent at worst, clinging to the prior departure framework will not contribute to the "certainty and fairness" that the Guidelines were supposed to produce.[21] Third, the post-*Booker* development of "variances"—non-guideline sentence adjustments made in the court's discretion based on § 3553(a)—enables courts to fashion appropriate, flexible, and purposeful punishments that render the departure mechanism obsolete and lets judges judge. Fourth, because abandoning departures still requires judges to consider the Guidelines (just not departures from the Guidelines), fears of "unchecked judicial discretion" would be unfounded. Fifth, reducing the three-step inquiry into two steps will promote clarity and efficiency. Calculating the Guidelines sentence and considering whether a variance is appropriate is all that is needed, thus eliminating remands for improper departure calculations.

This Note examines departure jurisprudence under the mandatory Guidelines to illustrate its failings and demonstrate why continuing to require departure analysis does not contribute to principled sentencing.[22] Part II provides a background of federal sentencing law through the enactment of the Guidelines and an explanation of why the departure mechanism was seen as an important part of the Guidelines. Part III analyzes departure jurisprudence under the mandatory Guidelines using family circumstances as an illustrative example of the failings of Guidelines departures. Part III also examines the disagreement regarding the validity of departures prior to *Booker*. Part IV discusses *Booker* and the competing approaches adopted in the courts of appeals regarding the continuing validity of departures. Finally, Part V proposes adopting the minority approach of departure obsolescence and having the Commission rewrite Chapter 5 of the Guidelines to reflect the purposes of punishment in light of the now-advisory Guidelines. Ultimately, this will lead to sentencing that is both more flexible and more aligned with the purposes of punishment.

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[20] *See* discussion *infra* Part III.D.

[21] 28 U.S.C. § 991(b)(1)(B) (2000).

[22] If any departures are to be kept alive, certainly section 5K1.1 "substantial assistance to authorities" departures would be a great candidate. USSG § 5K1.1. If only one group of departures had to go, it would certainly be those based on "discouraged" factors in section 5H of the Guidelines, as these led to particular confusion. *Id.* § 5H. But even discarding all departures would not mean that variances could not be granted for the same reasons traditional departures were.

II. FEDERAL SENTENCING BEFORE 1987

A. *The Evolution of Federal Sentencing from the Beginning to the 1970s*

Prior to the enactment of the Sentencing Reform Act (SRA)[23] in 1984 and the promulgation of the Guidelines[24] in 1987, federal judges enjoyed "nearly unfettered discretion"[25] when sentencing. Prior to the enactment of the SRA, federal sentencing was an area of law that experienced only small reform efforts[26] and the majority of the 20th century was characterized by wide judicial discretion. Aside from legislatively imposed maximum sentences and constitutional limitations on excessive sentences, the task of sentencing federal offenders was left almost entirely up to judges.[27] Furthermore, even as Congress created more federal criminal statutes, they rarely created mandatory minimums which would have checked judicial discretion somewhat.[28] Perhaps most indicative of the power and autonomy judges held in the province of sentencing was that prior to the Guidelines federal prosecutors were usually unable to appeal sentences they felt were too lenient.[29]

Clearly, a system with such wide discretion could, and did, lead to vastly different sentences. Yet, tailoring a sentence to the specific crime or the myriad nuances of a particular defendant was not what prompted calls for reform. What troubled many was that this discretion yielded substantially

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[23] Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1837 (1984) (codified at 18 U.S.C. §§ 3551–3742 (2000), 28 U.S.C. §§ 991–998 (2000)).

[24] SENTENCING GUIDELINES, *supra* note 8.

[25] Berman, *supra* note 10, at 25.

[26] *See* Robert J. Anello & Jodi Misher Peikin, *Evolving Roles in Federal Sentencing: The Post*-Booker/Fanfan *World*, 2005 FED. CTS. L. REV. 9, ¶ I.8 (Sept. 2005), http://www.fclr.org/2005fedctslrev9.htm.

[27] *Id.* at ¶ I.8 ("The only limits placed on a judge in considering information to determine a sentence were constitutionally based, barring a court from considering information obtained in violation of the due process clause, the privilege against self-incrimination, and the sixth amendment right to counsel.").

[28] *See* Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 169–70 (1995) ("Subject only to statutory maximums and the occasional minimums, judges had the authority to sentence convicted defendants either to probation (and under what conditions) or to prison (and for what maximum term).").

[29] *See, e.g.*, United States v. Tucker, 404 U.S. 443, 447 (1972) (citing Gore v. United States, 357 U.S. 386, 393 (1958)) ("[A] sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review.").

different sentences for *similar* defendants.[30] Moreover, some studies found that disparities could be explained by considering an offender's race, gender, and socioeconomic status.[31] The judicial discretion exercised at this time also left judges particularly open to criticism. Without standards and without appellate review, there was no body of sentencing law to which judges could look for guidance and support.[32] This "standardless" and "unreviewable" sentencing power was criticized for yielding excessive punishments for some and undue leniency for others (white and middle-class defendants in particular).[33]

B. *The Calls for Reform*

In 1973, Federal District Judge Marvin E. Frankel published *Criminal Sentences: Law Without Order*,[34] which severely criticized the very discretion he held and bestowed as judge.[35] Describing judicial discretion as "almost wholly unchecked" and "terrifying and intolerable for a society that professes devotion to the rule of law,"[36] Frankel called for the creation of an administrative agency to create "binding guides" on sentencing courts.[37] Frankel's call for reform was eventually answered, and he has since been given the title "father of sentencing reform."[38]

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[30] Berman, *supra* note 10, at 26. *See also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 21 (1973) ("The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the divergences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes.").

[31] *See, e.g.*, Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895–97 (1990) (detailing studies showing widespread, unwarranted sentencing disparities). *See also* Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272–74 (1977) (reviewing studies and asserting that "the data on unjust sentencing disparity have indeed become quite overwhelming").

[32] Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion:* Koon*'s Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 508 (1999).

[33] *Id.*

[34] FRANKEL, *supra* note 30.

[35] Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (1993).

[36] FRANKEL, *supra* note 30, at 5.

[37] Stith & Koh, *supra* note 35, at 228 (quoting FRANKEL, *supra* note 30, at 122).

[38] *Id.* (quoting 128 CONG. REC. 26, 503 (1982) (statement of Sen. Kennedy)). Stith and Koh called Frankel's work "the cornerstone of the legislative effort to replace judicial discretion in criminal sentencing with certainty and administrative expertise." *Id.*

More than a decade passed between the publishing of Frankel's influential book and the enactment of the SRA in 1984, but not due to a lack of discussion or attempted action. Various groups had very different views on how sentencing law should be restructured.[39] Some sentencing reformers did not even believe a sentencing commission was essential or necessary, although most felt this was to be integral.[40] Most reformers recognized the merits of judicial discretion, and thus did not suggest abolishing it; rather, discretion was to be structured, or guided, to achieve greater consistency across a range of cases without abandoning the needed flexibility that could account for differences between individual offenders.[41]

Successful reform needed to somehow balance the competing notions of continuing judicial discretion (at least on some level), while checking discretion so that unwarranted sentencing disparity would not continue.[42] The balance was struck in the form of guidelines where judges were vested with authority to depart from the guidelines. Indeed, the departure mechanism was to play a central role in maintaining flexibility while achieving greater sentencing consistency.[43]

And for sentencing geeks, Judge Frankel would be sure to be the "first inductee" in a "Sentencing Judges Hall of Fame," were one to exist. Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2004/11/a_thoughtful_an.html (Nov. 7, 2004, 20:26 EST).

[39] Anello & Peikin, *supra* note 26, at 10–11 ("Civil rights groups argued against the arbitrary and capricious nature of the sentences, based on what they believed were racial and other biases. Conservatives argued that the courts' discretion resulted in undue leniency and undermined the goal of deterrence. Yet others argued that 'broad, standardless discretion' denied due process.") (citations omitted).

[40] Berman, *supra* note 10, at 31 n.30.

[41] *See* TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 19 (1976).

[42] Berman, *supra* note 10, at 32.

[43] *Id.* at 32–33. Professor Berman continued:

> In sum, reformers believed that sentencing guidelines, by codifying standards which would direct judges' sentencing decisions in most but not all cases, could reduce sentencing disparities and maintain sentencing flexibility, while promoting the development of principled sentencing law and policy. The departure mechanism was critical to both the guidelines system's effectiveness and its broader mission. Not only was departure authority to supply a balanced measure of discretion in the sentencing of individual cases, it would also "facilitate the development of a 'common law of sentencing' to buttress and supplement the guidelines."

Id. at 35–36 (quoting MODEL SENTENCING AND CORRECTIONS ACT § 3-208 cmt. at 165–66 (1979)).

C. *The SRA, the Sentencing Commission and the Guidelines*

The efforts to reform federal sentencing law culminated in 1984 with the passage of the SRA.[44] The law met some of the original demands of "liberal" reformers, such as rules and reviewability, but also met demands of "law and order" conservatives, such as lengthening criminal sentences.[45] Without identifying an underlying philosophy of sentencing, the SRA represented the realization that prior judicial discretion was too easily wielded and too indiscriminately enforced.[46]

The SRA enabled Congress to create the U.S. Sentencing Commission. While the Commission had several aims, its first order of business was to create a "comprehensive set of sentencing guidelines."[47] The SRA's adoption of a guided sentencing approach required judges to sentence defendants within the ranges established in the guidelines "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[48] Thus, Congress provided for a determinate sentencing scheme that would normally result in a within-guidelines sentence aimed at reducing unwarranted sentencing disparity. But the departure mechanism was supposed to inject enough flexibility into the system to make it viable.[49]

The Commission promulgated the Guidelines in 1987.[50] The Guidelines create a range of sentences in months based on two factors: the offense level

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[44] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551–3742 (2000), 28 U.S.C. §§ 991–998 (2000)).

[45] Weinstein, *supra* note 32, at 509.

[46] *Id.* Weinstein called the lack of a chosen philosophy of sentencing "problematic." *Id. See also* Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997). Cole argued that the Commission's failure to make fundamental theoretical choices makes the goal of reducing disparity incoherent.

[47] Koon v. United States, 518 U.S. 81, 92 (1996) (citing 28 U.S.C. § 994 (1994)).

[48] 18 U.S.C. § 3553(b) (2000).

[49] This principle can be found in the Sentencing Commission's avowed purpose, which was to "provide certainty and fairness" in sentencing, "avoiding unwarranted sentencing disparities among defendants," while at the same time retaining "flexibility to permit individualized sentences when warranted by mitigating or aggravating factors" not considered by the guidelines. 28 U.S.C. § 991(b)(1)(B) (2000).

[50] The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017–34 (1984) (codified as amended at 28 U.S.C. §§ 991-998 (Supp. IV 1986)), established the Sentencing Commission to do so and stated that the Guidelines would take effect six months after the Commission submitted them. The Supreme Court gave its "constitutional blessing" in 1989, upholding the Guidelines despite a separation of powers challenge. *See* Mistretta v. United States, 488 U.S. 361, 412 (1989).

and the defendant's criminal history.[51] Judges were granted discretion to depart from the Guidelines sentence, but only in "extraordinary" situations.[52] While clearly the most commonly granted departures have been for substantial assistance to the prosecution, other departures are more relevant to this analysis, and any inquiry into the Guidelines, as they fundamentally create tension in a system that desires both discretion and uniformity.

III. DEPARTURE JURISPRUDENCE UNDER THE MANDATORY GUIDELINES

The mandatory Guidelines attempted to consider nearly every possible situation that would confront sentencing judges, and therefore, judicial discretion to depart from the Guidelines was supposed to be exercised rarely.[53] The problem was that not all departures were treated alike. For instance, departures based on "discouraged" factors could only be granted in "extraordinary" cases.[54] But the Commission's guidance as to when a discouraged factor was extraordinary was lacking, and courts were left to their own devices to hash out the results. Worse yet, the Supreme Court in *Koon v. United States* missed the perfect opportunity to bring much needed clarity to the issue.[55] The differences in opinion regarding the relevance and merits of departures are illustrated in the difficulties the courts had in applying departures and in the fundamental changes wrought on departure jurisprudence by the Feeney Amendment in 2003.[56] Thus, the mandatory Guidelines were far from perfect in their manifestation.

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[51] Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 6 (1991) ("At the core of these Guidelines is a sentencing grid, containing forty-three offense levels on its vertical axis and six criminal history categories on its horizontal axis. At the confluence of each offense level and criminal history category is a sentencing range . . . ."). The Guidelines-calculation process is also explained by way of a hypothetical problem posed by Justice Breyer, a former Sentencing Commissioner himself, and provides a helpful walk-through. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6–7 (1988).

[52] SENTENCING GUIDELINES, *supra* note 8, ch. 5, pt. H, introductory cmt.

[53] SENTENCING GUIDELINES, *supra* note 8, ch. 1, pt. A, introductory cmt. 4(b), at 1.6.

[54] *See id.* ch. 5, introductory cmt. (noting "certain circumstances are not ordinarily relevant" to the departure analysis).

[55] 518 U.S. 81 (1996).

[56] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

A. *Departures Under the Mandatory Guidelines*

In creating the Guidelines, the Commission devoted an incredible amount of energy attempting to conceive of nearly every possible situation that would arise. While recognizing this was impossible, the Commission created the "heartland" concept, whereby the guidelines embodied the typical case, and departures were to be for cases outside this typical range.[57] And, other than the few factors specifically prohibited from consideration in the departure analysis, the Commission did "not intend to limit the kinds of factors . . . that could constitute grounds for departure in an unusual case."[58] But the Guidelines clearly indicate that departures are to be utilized infrequently.[59]

The strict and detailed language of the Guidelines supports the Commission's assertion that departures would be rare.[60] Furthermore, "the Commission declared many potentially mitigating personal characteristics 'not ordinarily relevant' or entirely irrelevant to whether an offender's sentence should involve a departure."[61] These factors came to be known as "discouraged"[62] and "forbidden"[63] grounds for departure, respectively.

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[57] More specifically:

> The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

SENTENCING GUIDELINES, *supra* note 8, ch. 1, pt. A, introductory cmt. 4(b), at 1.6.

[58] *Id.*

[59] *Id.* ("[D]espite the courts' legal freedom to depart from the guidelines, they will not do so very often.").

[60] *See generally* SENTENCING GUIDELINES, *supra* note 8; *see also* KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 73–76 (1998) (noting the Commission "directly circumscribed judicial power to depart").

[61] Berman, *supra* note 10, at 49. *See also* USSG §§ 5H1.1–.6 (providing that age, education and vocational skills, mental and emotional conditions, physical condition, employment history, family ties and responsibilities, and community ties are "not ordinarily relevant [in determining] whether a sentence should be outside the applicable guideline range") *and* § 5H1.4 (stating that drug dependence or alcohol abuse "is not a reason for a downward departure").

[62] *See* Jennifer L. Cordle, *The Imagination is a Fertile Stomping Ground: Non-Enumerated Grounds for Departure from the United States Sentencing Guidelines Under § 5K2.0*, 47 CLEV. ST. L. REV. 193, 202–03 (1999). "Discouraged" factors, such as those found in §§ 5H1.1-.6 are not forbidden, but are not encouraged, either.

[63] *Id.* at 201. "Forbidden" factors include "race, sex, national origin, creed, religion, and socio-economic status," (citing USSG § 5H1.10); "lack of guidance as a youth," (citing USSG § 5H1.12); and "drug or alcohol dependence," (citing USSG § 5H1.4).

Departing based on discouraged factors presented its own unique analysis with focus on extraordinariness. As a First Circuit judge and former Sentencing Commissioner, Justice Breyer explained that when courts contemplate departures based on discouraged factors, they should first consider whether the case is ordinary or not; if it is ordinary, no departure should be granted.[64] But if the case is extraordinary, the court should continue to determine if a departure could appropriately be applied.[65] The problem, however, was that in the main the analysis began and ended with the determination of ordinary or extraordinary. This focus on "extraordinariness" can be found throughout discouraged departure jurisprudence, and in this way, sentencing law developed devoid of significant sentencing considerations, especially § 3553(a) factors.

B. *Family Circumstances Departure Jurisprudence: Illustrative of the Departure Mechanism's Failures*

Although section 5H1.6 of the Guidelines declared family ties and responsibilities "not ordinarily relevant"[66] in the departure analysis, this language was immediately interpreted to mean that family ties that were extraordinary were relevant.[67] While this enabled defendants to succeed in obtaining departures for extraordinary family circumstances, courts granted these departures by engaging in an analysis of the "extraordinariness" of the

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"Encouraged" and "unmentioned" (or non-enumerated) factors can also provide grounds for departure. "Encouraged" factors include "conduct of the victim that provoked the offense behavior" (citing USSG § 5K2.10); when a crime is committed "in order to avoid a greater harm" (citing USSG § 5K2.11); "if a defendant commits a crime due to coercion or duress," (citing USSG § 5K2.12); and "if a defendant committed an offense while suffering from a significantly reduced mental capacity" (citing USSG § 5K2.13). *Id.* at 201–02. The Cordle Article focuses on "non-enumerated" departures, stressing the "unlimited grounds that could possibly warrant departure" under § 5K2.0's "catch-all" provision. *Id.* at 209.

[64] United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993).

[65] *Id.* Judge Breyer's language was instructive when he said if a case dealing with a discouraged factor "is not ordinary, the court would *go on to consider* departure." *Id.* (emphasis added). Significantly, Breyer noted that the continuation of this analysis would be informed by "generally relevant sentencing factors, including the 'nature and circumstances of the offense,' the 'history and characteristics of the defendant,' and the basic purposes of sentencing, namely, just punishment, deterrence, incapacitation and rehabilitation." *Id.* (quoting 18 U.S.C. § 3553(a) (2000)).

[66] USSG § 5H1.6.

[67] Berman, *supra* note 10, at 67 (explaining the pitfalls of this improper focus). Professor Berman further argues that this myopic and misplaced focus led to "'purposeless' departures"—that is, departures that failed to consider whether such a reduced sentence "actually served the purposes of punishment set forth in the SRA." *Id.*

family circumstances rather than looking to the purposes of punishment.[68] The result was a confusing body of law that failed to remain true to the SRA's mandate of "provid[ing] certainty and fairness in meeting the purposes of sentencing."[69]

While the malleable standard of "extraordinariness" led to fact-intensive inquiries yielding disparate treatment for similarly-situated defendants, the courts were at least in agreement early on as to what did *not* constitute extraordinary family circumstances.[70] For example, simply caring for children did not rise to the level of "extraordinary" family circumstances.[71] Likewise, the fact that a family suffers when a member is sentenced to prison is not extraordinary.[72] Yet none of the courts entirely agreed on what "ordinarily relevant" meant,[73] and early disagreements over what constituted extraordinary family circumstances[74] have yet to be reconciled. More importantly, the debate over extraordinariness hindered courts from developing a family circumstances departure jurisprudence that was properly focused on sentencing with § 3553(a) factors in mind.

Even when a court followed an announced family circumstances departure standard, defendants still faced disparate treatment. A sample study of sentencing decisions discussing family-circumstances downward departures from 1989 to 1999 found three distinct legal standards employed

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[68] While criticizing this approach as "purposeless," Professor Berman acknowledged that "it does not appear that all or even most departures for 'extraordinary' circumstances were truly purposeless. A review of this case law reveals that often lurking beneath debates over 'extraordinariness' were underlying concerns and judgments about culpability, crime control, and the traditional purposes of punishment embraced by the SRA." *Id.* at 68.

[69] 28 U.S.C. § 991(b)(1)(B) (2000).

[70] *See* ROGER W. HAINES, JR. ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 698 (1997).

[71] *Id.*

[72] *Id.* at 699 ("All families suffer when one of their members goes to prison. That is why family circumstances are not in the words of the policy statement 'ordinarily relevant.'" (quoting United States v. Shortt, 919 F.2d 1325, 1328 (8th Cir. 1990)) (citing United States v. Harrington, 82 F.3d 83 (5th Cir. 1996); United States v. Brewer, 899 F.2d 503 (6th Cir. 1990); United States v. Fiterman, 732 F. Supp. 878 (N.D. Ill. 1989)).

[73] Jennifer A. Segal, *Family Ties and Federal Sentencing: A Critique of the Literature*, 13 FED. SENT'G REP. 258, 259 (2001) ("One of the most significant points of contention over family ties departures is the meaning of 'ordinarily relevant' in § 5H1.6 . . . .").

[74] *See* Susan E. Ellingstad, Note, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 966–70 (noting early points of disagreement on family circumstances departures in the Circuit Courts).

by courts.[75] Departures were justified "(1) if the family circumstance [was] extraordinary; or (2) if the impact of the sentence on the family [was] exceptional; or (3) if the family circumstance [was] substantial."[76] These three departure standards do not merely differ in semantics; rather, the standard employed greatly influenced the likelihood that a defendant would receive a downward departure at all.[77] Thus, a defendant facing a sentencing judge or an appellate court under the first standard had a slight one-in-four chance of receiving a downward departure. At the same time, a defendant facing the third standard had nearly a two-in-three chance of receiving a downward departure. While this is not the kind of uniformity envisioned by the Guidelines, it is also telling that none of the three standards mention anything about § 3553(a) factors relevant to sentencing.

The inconsistencies across (and even within) districts and circuits regarding family-circumstances departure jurisprudence abound. Another standard, the "sole caretaker" or "sole provider" for children, which has been utilized by sentencing judges and appellate courts at times, provides another example.[78] This sub-category of family circumstances has sometimes been viewed as sufficiently extraordinary to warrant a departure. In *Haversat*, the defendant's participation in his wife's medical treatment was characterized as an "irreplaceable" part of her recovery by her treating physician, and the doctor testified that a separation of the defendant from his wife—even only

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[75] Amy Farrell, *Distinguishing Among the "Unhappys": The Influence of Cultural Gender Norms on Judicial Decisions to Grant Family Ties Departures*, 13 FED. SENT'G REP. 268, 269 (2001).

[76] *Id.* The first standard is the strictest and "is commonly found in family ties departure cases in the First, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits." *Id.* The second standard is not as strict and "differs from the first because it measures the actual impact of the sentence, rather than measuring the unusualness of the family circumstance itself." *Id.* The Third, Eighth, Tenth, and D.C. Circuits often applied this middle-ground approach. *Id.* The third standard is the most lenient as it only requires a showing of "substantial" family need or circumstance. *Id.* at 270. The Second Circuit most commonly applied this standard. *Id.*

[77] *Id.* at 270. Under the first standard, defendants were granted a departure 25% of the time. Under the second standard, defendants were granted a departure 33% of the time. The third standard, however, saw defendants successful in achieving a downward departure 63% of the time. *Id.*

[78] *See, e.g.*, United States v. Haversat, 22 F.3d 790, 797 (8th Cir. 1994). The *Haversat* Court, while reversing a downward departure on improper grounds, noted that a family circumstances departure was appropriate in this case because the defendant's wife's "severe psychiatric problems" had "been potentially life threatening," the defendant was "actively involved in her care," and a doctor testified that the defendant's wife "would not do well if separated from the aid of her spouse." *Id.*

for a few weeks—could have grave medical consequences.[79] But even courts using this standard often disagreed. Indeed, most courts have concluded "even sole parenting responsibilities are insufficient to permit a departure."[80]

The initial departure jurisprudence under the Guidelines can therefore be characterized as exceedingly narrow.[81] While the Guidelines were enacted to rein in unfettered judicial discretion, "[t]he departure mechanism was supposed to ensure that judges could craft individualized sentences."[82] Yet many felt that in practice, for a variety of reasons, the Guidelines were too rigid.[83] The result was uniformity in sentences, but the uniformity was unwarranted "as offenders of differing culpability were given similar sentences."[84] As a result, the Supreme Court "stepped in to try to cancel some of the pro-rigidity inclinations of the federal appellate decisions."[85]

C. Koon v. United States *and the Supreme Court's Missed Opportunity to Fix Departure Jurisprudence*

The Supreme Court attempted to rid the Guidelines of unnecessary rigidity in *Koon v. United States*.[86] The Court recognized district courts' "institutional advantage" over appellate courts in determining whether a

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[79] *Id. See also* United States v. Moy, No. 90CR760, 1995 U.S. Dist. LEXIS 6732, at *91 (N.D. Ill. May 18, 1995) (finding it significant that the defendant—Mr. Moy—was Mrs. Moy's principal caretaker and the Moys' son would have been "unable to provide her daily care and would be slow in responding to any emergency").

[80] Douglas A. Berman, *Addressing Why: Developing Principled Rationales for Family-Based Departures*, 13 FED. SENT'G REP. 274, 275 (2001) (citing cases rejecting the sole caretaker standard in the Third, Fourth, Sixth, Eighth, Tenth, and D.C. Circuits).

[81] Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1466 (1997). Reitz quotes the "father of sentencing reform" Marvin Frankel as summarizing this initial jurisprudence this way:

> [T]he courts of appeals have been notably narrow in their allowance of departures. . . . More than one circuit—tending to read the words "not ordinarily relevant" to mean "never or hardly ever relevant"—have used this aspect of the Commission's work to enhance the rigidity that has the district judges chafing.

Id. (quoting Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2048, 2050 (1992)).

[82] Berman, *supra* note 10, at 60.

[83] *Id.* Berman notes that "some primarily faulted the Sentencing Commission for promulgating strict departure standards, and others stressed the impact of circuit court decisions reversing and otherwise discouraging departures." *Id.*

[84] *Id.* at 61.

[85] Reitz, *supra* note 81, at 1466.

[86] 518 U.S. 81 (1996).

factor is exceptional in a particular case, and therefore adopted the abuse of discretion standard to apply to appeals.[87] Indeed, "*Koon* represents rejection of the appellate courts' prevailing approach to departure review, in favor of a dramatically more deferential process."[88] However, the opinion also states: "whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point."[89] As a result, the opinion is fairly characterized as one that produced more confusion than clarity.[90] And although "*Koon* is now always cited and often discussed in lower court departure decisions," its equivocal message has meant that "it has had little substantive impact on the federal sentencing landscape other than to exacerbate doctrinal confusion and sentencing disparities in the realm of departures."[91]

In the first years after *Koon*, appellate courts divided into three camps: (1) those that used the abuse of discretion standard to reverse every downward departure; (2) those that affirmed every downward departure; and (3) those that affirmed and reversed decisions to depart.[92] More to the point, though, while *Koon* "changed the rhetoric of departure jurisprudence in the courts of appeals, ... it has done little to change outcomes."[93] Thus, the Supreme Court's decision in *Koon* was a waste of an excellent opportunity to bring much needed uniformity and clarity to departure jurisprudence under the Guidelines.

D. *Post-*Koon *and Pre-*Booker*: The PROTECT Act and the Feeney Amendment Highlight Major Disagreement over the Success (or Failure) of Departure Jurisprudence*

On April 10, 2003, Congress passed the PROTECT Act,[94] including the "Feeney Amendment,"[95] which effected the most substantive changes to the

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[87] *Id.* at 98–100.

[88] Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of* Koon v. United States, 58 OHIO ST. L.J. 1697, 1697–98 (1997).

[89] *Koon*, 518 U.S. at 100.

[90] Berman, *supra* note 10, at 74.

[91] *Id.* at 80.

[92] Weinstein, *supra* note 32, at 526–27. Group one is comprised of the First, Third, Fourth, Sixth, Seventh, Eighth, and D.C. Circuits. *Id.* at 527 n.190. Group two is made up only of the Second Circuit. *Id.* at 527 n.191. Group three includes the Fifth, Ninth, Tenth, and Eleventh Circuits. *Id.* at 527 n.192.

[93] *Id.* at 526.

[94] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

Guidelines since their inception. The primary purpose of the PROTECT Act was not controversial; it focused on strengthening the laws for detecting, investigating, and prosecuting persons who kidnap and abuse children.[96] But the Feeney Amendment created a firestorm.[97] Originally, the Amendment "sought to all but abolish downward departures entirely and to establish unprecedented Congressional monitoring of judicial downward departure decisions."[98] While the Amendment that was ultimately adopted, after just fifteen minutes of debate in the House,[99] did not completely abolish judicial authority to depart, it did severely curtail it.[100] The clear purpose of the Feeney Amendment was "to make it more difficult for federal district judges to grant downward departures from the Guidelines and for such departures to be upheld on appeal."[101]

The Feeney Amendment included a directive to the Sentencing Commission to promulgate, within 180 days, amendments to the Guidelines that would "ensure that the incidence of downward departures [were] substantially reduced."[102] On October 27, 2003, the Commission issued emergency amendments to comply with this order.[103] Section 5H1.6 was amended to include detailed criteria to better inform a judicial decision to

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[95] The "Feeney Amendment" is § 401 of the PROTECT Act.

[96] Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT'G REP. 310, 310 (2003).

[97] David P. Mason, Note, *Barking Up the Wrong Tree: The Misplaced Furor Over the Feeney Amendment as a Threat to Judicial Independence*, 46 WM. & MARY L. REV. 731, 733 (2004).

[98] Vinegrad, *supra* note 96, at 310.

[99] Mark T. Bailey, Note, *Feeney's Folly: Why Appellate Courts Should Review Departures From the Federal Sentencing Guidelines with Deference*, 90 IOWA L. REV. 269, 286 (2004).

[100] Vinegrad, *supra* note 96, at 314. Specifically:

> [T]he revised statute (1) eliminated numerous grounds for downward departure in child-victim, sexual abuse and obscenity cases, (2) expanded the grounds for appellate reversal of downward departures, (3) granted appellate courts the authority to review departure decisions under a *de novo* standard of review, (4) limited district courts' ability to downwardly depart on remand, (5) prohibited the Commission from creating new downward departure guidelines for the next two years, and (6) conditioned the "early disposition" departure and three-level acceptance of responsibility adjustment on a government motion.

Id.

[101] Alan Vinegrad, *The New Federal Sentencing Guidelines: The Sentencing Commission's Response to the Feeney Amendment*, 16 FED. SENT'G REP. 98, 98 (2003).

[102] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(m)(2)(A), 117 Stat. 650, 675 (2003).

[103] Vinegrad, *supra* note 101, at 98.

depart downward based on family ties and responsibilities.[104] Yet, the increase in detail was not done so much to make the application of a section 5H1.6 departure an easier exercise for the judge as it was done to make a family circumstances departure more difficult to obtain. Regardless, the amended section 5H1.6—and the other amended departures—did not result in greater uniformity in their application, and did not result in more purposeful sentences.[105]

The Feeney Amendment did encourage debate, and the resulting discourse provides us with many different views regarding the validity of departures. The Commission, in a letter to Senators Hatch and Leahy of the Senate Judiciary Committee, stated that it shared Congress' "concern with respect to increased departure rates."[106] That same week, the Judicial Conference of the United States wrote Chairman Hatch to say that "[t]he Judicial Conference strongly opposes several of these sentencing provisions because they undermine the basic structure of the sentencing system and impair the ability of courts to impose just and responsible sentences."[107] In all, a multitude of groups voiced their opinions both in favor of and against the Feeney Amendment.[108]

The criticism did not subside after the Feeney Amendment became law. The Judicial Conference of the United States went so far as to publicly support efforts to repeal the Feeney Amendment, especially its "command

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[104] *Id.* at 99. Section 5H1.6's application note was amended to "require" a court to consider (1) the seriousness of the offense; (2) the involvement of the defendant's family members in the offense; and (3) the danger to the defendant's immediate family members as a result of the offense. USSG § 5H1.6 cmt. n.1. Moreover, for a departure based on the loss of caretaking or financial support, a court was "required" to find the presence of four factors: (1) a substantial, direct, specific loss of essential caretaking or financial support to the defendant's family; (2) a loss that substantially exceeds the harm ordinarily incident to incarceration for a similarly-situated defendant; (3) no effective, reasonably available remedial or ameliorative programs; and (4) a departure that will effectively address the loss. *Id.*

[105] This is particularly significant now, in the wake of *United States v. Booker*, 543 U.S. 220 (2005). Had the Commission's amendments resulted in alleviating the controversy surrounding departures and led to more principled sentencing outcomes, then the pre-*Booker* departure framework would be helpful even under the post-*Booker* regime of advisory Guidelines. *See infra* Part IV.B.

[106] Letter from Voting Members of U.S. Sentencing Commission to Sens. Hatch and Leahy (Apr. 2, 2003), *reprinted in* 15 FED. SENT'G REP. 341, 342 (2003).

[107] Letter from Leonidas Ralph Mecham, Sec'y of Judicial Conference of the U.S. to Sen. Hatch (April 3, 2003), *reprinted in* 15 FED. SENT'G REP. 343, 343–44 (2003).

[108] *See generally Materials from Interested Groups Opposing Original Feeney Amendment*, 15 FED. SENT'G REP. 346, 346–54 (2003); *see also* Letter from Justice Dept. to Sen. Hatch (Apr. 4, 2003), *reprinted in* 15 FED. SENT'G REP. 355, 355 (2003) (supporting original Feeney Amendment).

that the Commission reduce the incidence of downward departures."[109] One government lawyer had to face Judge Guido Calabresi's distaste for the Feeney Amendment at oral argument in the Second Circuit when Judge Calabresi said the flaw of the new system is that "it takes discretion from independent courts and gives it to dependent prosecutors, who then have to answer to the attorney general and other political figures."[110]

The vastly different views regarding the Feeney Amendment were more a reflection of how the Guidelines were seen as playing out in the courts, especially in the years after the *Koon* decision. Many felt the increase in downward departures was lamentable, but many did not. In October, 2000, the Senate Judiciary Committee's Criminal Justice Oversight Subcommittee held a public hearing in which many of these viewpoints were expressed.[111] Shortly thereafter, the Sentencing Commission itself set out to assess the results of the Guidelines. The general conclusion was that "the [G]uidelines have fostered progress in achieving the goals of the Sentencing Reform Act."[112] There had been a reduction in disparities based on race and ethnicity and "less inter-judge disparity for similar offenders committing similar offenses."[113] But the Commission's optimism was countered by significant criticism in the broader legal community. In fact, the American College of Trial Lawyers' assessment reached the opposite conclusion, labeling the Guidelines "an experiment that has failed."[114]

Yet while many assailed the Guidelines for perceived inflexibility and undue rigidity, the Guidelines were also attacked due to the more recent trend of an increase in the number of downward departures granted.[115] While an

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[109] Vinegrad, *supra* note 101, at 98 (Sentencing Commission's response).

[110] *Id.*

[111] *See generally* Senate Judiciary Committee, *Criminal Justice Oversight Subcommittee Hearing on "Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed?,"* 15 FED. SENT'G REP. 317 (2003).

[112] U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM xvi (2004), *available at* http://www.ussc.gov/15_year/executive_summary_and_preface.pdf.

[113] *Id.*

[114] AM. COLL. OF TRIAL LAWYERS, UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED 1 (2004), *available at* http://kingofkingsdvd.homestead.com/Sentencing_Guidelines.pdf. The report's concerns included "incursion on the independence of the federal judiciary, a transfer of power from the judiciary to prosecutors and a proliferation of unjustifiably harsh individual sentences." *Id.*

[115] Interestingly, the American College of Trial Lawyers attacked the Guidelines *on both grounds*. *See* Am. Coll. of Trial Lawyers, *Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1503, 1503 (2001) (arguing that the application of section 5K1.1 of the Guidelines has generated unwarranted disparities, unpredictability and unfairness in sentencing).

increase in downward departures might have been a welcome change for many critics of the Guidelines, the problem was that this increase resulted in unwarranted sentence disparities—one of the principal evils the Guidelines were drafted to ameliorate.[116] Worse yet, these shortcomings led some to proclaim that "establishing uniformity in sentencing was not possible."[117] Therefore, it is clear that the state of sentencing law, particularly the aspects dealing with departures, was in confusion. The Guidelines had not brought about the goal of uniformity, and many felt they had not even achieved the goal of eliminating unwarranted disparity. Most importantly, no one was sure what to do with departures from the Guidelines. If that were not enough, the Supreme Court decided to change everything in 2005.

IV. *UNITED STATES V. BOOKER* AND *BOOKER* IN THE CIRCUITS

A. *The Holding of* Booker *and Its Effects*

In *Booker*, the Supreme Court held that enhancing a sentence based on facts found by a judge by the preponderance of the evidence, rather than found by the jury beyond a reasonable doubt, violated a defendant's Sixth Amendment rights.[118] This decision was the culmination of a line of cases beginning with *Apprendi v. New Jersey* in 2000.[119] The Court applied its rationale from *Apprendi* to declare a state's sentencing guidelines scheme unconstitutional in *Blakely v. Washington* in 2004.[120] After the Court's decision in *Blakely*, the only question that remained was whether the Court would apply the same analysis to a challenge of the Federal Guidelines. In *Booker*, the Supreme Court answered "yes."[121]

But this is only the first part of the opinion. The second part of the opinion, written by a different majority of Justices,[122] concluded that the

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[116] Anello & Peikin, *supra* note 26, at 20.

[117] *Id.*

[118] United States v. Booker, 543 U.S. 220, 226–27 (2005).

[119] 530 U.S. 466 (2000). *Apprendi* held it unconstitutional to sentence a defendant beyond the statutory maximum sentence without requiring proof beyond a reasonable doubt to be determined by a jury. *Id.* at 476.

[120] 542 U.S. 296 (2004). Although Blakely pled guilty to second-degree kidnapping and faced a sentencing range of 49 to 53 months under Washington state's guidelines system, Blakely was sentenced to 90 months in prison when, after an evidentiary hearing, the court found he had acted with "deliberate cruelty." *Id.* at 298. The Supreme Court ruled that this deprived him of his right to have a jury determine all facts essential to his sentence. *Id.* at 305–06, 308.

[121] *See generally Booker*, 543 U.S. at 220.

[122] Justice Stevens authored "Part One" of the opinion and was joined by Justices Scalia, Souter, Thomas and Ginsburg. *Id.* at 226–27. Unsurprisingly, these Justices

provisions of the Guidelines making them mandatory were unconstitutional and that the Guidelines were from now on to be "advisory."[123] But the fact that the Guidelines were "advisory" rather than mandatory "nonetheless requires judges to take account of the Guidelines together with other sentencing goals."[124] Specifically, the "other sentencing goals" identified by the second part of the opinion were those identified in 18 U.S.C. § 3553(a).[125] For instance, post-*Booker*, a sentence was still required to "reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, [and] protect the public."[126] Furthermore, a sentence is required to consider the applicable Guidelines ranges, relevant Commission policy statements, and the need to avoid unwarranted sentencing disparities.[127] Finally, "Part Two" of the opinion adopted the appellate review standard of "unreasonableness" for future appeals in the wake of *Booker*.[128]

The importance of the "*Booker* remedy"—the directive that the Guidelines were now to be advisory—was that "the non-mandatory nature of the Guidelines now makes other factors equally as important in a judge's sentencing determination."[129] Namely, the factors in § 3553(a), already in existence prior to *Booker*, were given new life and added significance in

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comprised the same majority in *Blakely*. Justice Breyer wrote "Part Two" of the opinion and was joined by Justices O'Connor and Kennedy and Chief Justice Rehnquist (the dissenters in "Part One") and Justice Ginsburg. *Id.* at 244. Ginsburg offered no explanation for her unique decision to agree with both the Stevens and Breyer opinions.

[123] *Booker*, 543 U.S. at 245. This "Part Two" of the opinion, also called the "*Booker* remedy," determined 18 U.S.C. § 3553(b)(1) (2000), which made the Guidelines mandatory, and 18 U.S.C. § 3742(e) (2000), which relied on the mandatory nature of the Guidelines, to be "severed and excised," making the Guidelines "effectively advisory." *Id.* The confusion caused by the decision did not go unnoticed. One writer summarized *Booker* this way: "federal judges aren't required to follow mandatory sentencing guidelines, but still . . . 'must consult' them and 'take them into account.'" Eric Umansky, *Supremely Confusing*, SLATE, Jan. 13, 2005, http://www.slate.com/id/2112256/.

[124] *Booker*, 543 U.S. at 259.

[125] *Id.* at 259–60. *See also supra* note 14 (listing § 3553(a) factors). Of course, the § 3553(a) factors were not drawn out of thin air. Indeed, from its outset, the SRA contemplated that the Commission would "establish sentencing policies and practices . . . that assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code." 28 U.S.C. § 991(b)(1) (2000).

[126] *Booker*, 543 U.S. at 260 (citing 18 U.S.C. § 3553(a)(2)(A)–(C)).

[127] *Id.* at 259–60 (citing 18 U.S.C. § 3553(a)).

[128] *Id.* at 261. This was crucial to the second part of the opinion because the excision of § 3742(e) eliminated the prior appellate review standard, but the "unreasonableness" standard "Part Two" announced was "implicit" and "a practical standard of review already familiar to appellate courts." *Id.* at 260–61.

[129] Anello & Peikin, *supra* note 27, at 31–32.

future decisions in determining sentences under the advisory Guidelines and in appellate review of such sentences. Perhaps most significant of all in § 3553(a) is its first command that a sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection."[130]

B. *Applying* Booker *in the Lower Courts*

Booker's edict that the Guidelines were now "mandatorily advisory" quickly led to foreseeable conflicts in the lower courts.[131] Yet the significant reality is that "there is universal lower court agreement that, after *Booker*, district judges must still properly calculate guideline sentencing ranges and must still provide a reasoned justification for any decision to deviate from the Guidelines."[132] In fact, Professor Berman's review of the first year of case law following *Booker* led him to conclude that "[i]n short, a culture of guideline compliance has persisted."[133] Although, that is not to say *Booker* has failed to effect any change; indeed, "[t]hese cases suggest that sentencing after *Booker* at least sometimes reflects . . . 'a new methodology of judicial deliberation.'"[134]

One question that remains unanswered in the wake of *Booker* is whether requiring consultation of the Guidelines in the sentencing process necessarily requires consulting traditional departures from the Guidelines.[135] The overwhelming majority of the U.S. circuit courts have answered in the affirmative.[136] A distinct minority comprising the Seventh and Ninth Circuits

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[130] 18 U.S.C. § 3553(a).

[131] *Compare* United States v. Ranum, 353 F. Supp. 2d 984, 985–87 (E.D. Wis. 2005) (suggesting that § 3553(a) is the central focus and that if a sentence comports with that, a district court need not even address why it decided to vary the sentence), *with* United States v. Wilson, 355 F. Supp. 2d 1269, 1275–77 (D. Utah 2005) (flatly rejecting this approach, believing this kind of *Booker* interpretation leaves the appellate courts with the wide discretion that was to cease with the imposition of the Guidelines in the first place).

[132] Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 348 (2006) (citing United States v. Crosby, 397 F.3d 103, 113–14 (2d Cir. 2005) and other supporting cases).

[133] *Id.* at 349.

[134] *Id.* at 351 (quoting RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, SENTENCING WITH DISCRETION: CRACK COCAINE SENTENCING AFTER *BOOKER* 20 (2006), *available at* http://www.sentencingproject.org/pdfs/crackcocaine-afterbooker.pdf).

[135] *See* United States v. McBride, 434 F.3d 470, 474 (6th Cir. 2006) ("One murky area is what to do about the pre-*Booker* concept of 'departures' under the Guidelines now that the Guidelines are merely advisory.").

[136] United States v. Wallace, 461 F.3d 15, 32 (1st Cir. 2006); United States v. Selioutsky, 409 F.3d 114, 118–19 (2d Cir. 2005); United States v. Jackson, 467 F.3d 834,

has answered in the negative.[137] But virtually all post-*Booker* departure decisions are void of any discussion regarding the confusing state of pre-*Booker* departure jurisprudence. If departure decisions prior to *Booker* only created confusion, then reflexively applying the rationale of pre-*Booker* departure decisions will not lead to a more coherent body of sentencing law. Thus, it is now proper to examine the benefits and drawbacks of the two approaches to post-*Booker* departures to determine which framework sentencing courts should follow.

1. *The Majority Approach: Departures Are Still Relevant*

The view that departures remain a relevant part of the Guidelines calculation post-*Booker* finds support in the *Booker* opinion itself.[138] And even when considering *Booker*'s re-invigoration of § 3553(a) factors, the Guidelines and its policy statements are specifically mentioned in § 3553(a).[139] Policy statements include section 5H1.6 regarding family circumstances. More broadly, some courts of appeals have noted they are incapable of conducting reasonableness review when applicable departure analysis is missing because "otherwise the Guidelines cannot be considered properly."[140] Finally, some courts have taken the position that departure law

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837–39 (3d Cir. 2006); United States v. Moreland, 437 F.3d 424, 432–33 (4th Cir. 2006); United States v. Villegas, 404 F.3d 355, 361–62 (5th Cir. 2005); United States v. McBride, 434 F.3d 470, 474–77 (6th Cir. 2006); United States v. Hawk Wing, 433 F.3d 622, 631 (8th Cir. 2006) (although the concurrence quite notably says departures are obsolete post-*Booker*); United States v. Calzada-Maravillas, 443 F.3d 1301, 1305 (10th Cir. 2006); United States v. Crawford, 407 F.3d 1174, 1178 (11th Cir. 2005).

[137] *See* United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2005); United States v. Mohamed, 459 F.3d 979, 985–87 (9th Cir. 2006).

[138] *Booker*, 543 U.S. at 259–60 (stating judges are still required to consider policy statements). *See also* Nancy J. King, *Reasonableness Review After Booker*, 43 HOUS. L. REV. 325, 327 (2006) (finding support for continuing to properly apply departures in 28 U.S.C. § 3742 (2000)). Professor King argues that while the Guidelines are no longer mandatory, reasonableness review does not preclude appellate review for procedural error—which she argues includes failing to properly calculate departures—because *Booker* "did not 'excise' the portion of § 3742 that authorizes the appeal of errors in the calculation of the Guidelines and other violations of the law." *Id.* While such an approach would allow two avenues for appealing a sentence—one for substance and another for procedure—the simpler approach recognizing the ultimate goal of reasonableness is easier in application. *See infra* Parts IV.B.2, V.

[139] 18 U.S.C. § 3553(a)(4) (2000) (mentioning Guidelines) and § 3553(a)(5) (mentioning policy statements).

[140] United States v. Jackson, 467 F.3d 834, 838–39 (3d Cir. 2006); *see also* United States v. Hawk Wing, 433 F.3d 622, 631 (8th Cir. 2006) (noting "the district court must decide if a 'traditional departure' is appropriate" and on reasonableness review, "'the correct guidelines range is still the critical starting point for the imposition of a

prior to *Booker* "necessarily informs the sentencing process—for district courts and for us."[141] The result is that a majority of courts now follow a three-step process when considering whether to grant or uphold a sentence that varies from the Guidelines.[142]

There are several reasons why this approach quickly gained traction. First, in the initial weeks following *Booker*, the Commission actively pursued the three-step process that would maintain the relevance of traditional departures.[143] Moreover, the Commission believed that the Guidelines should be given substantial weight in the sentencing process and that § 3553(a) factors were already largely taken into consideration by the Guidelines themselves.[144] Thus, in the immediate and chaotic aftermath of *Booker*, one of the only authoritative voices was speaking clearly in favor of continued departure relevance.[145]

Second, judges may have eagerly followed this directive because by 2005, sentencing within the Guidelines framework—including the calculation of departures—had become the familiar way of sentencing. Paradoxically, the same forces of inertia that caused so much judicial hostility over the promulgation of the Guidelines were now working to keep the Guidelines in place. Retaining the traditional departure framework had the immediate appeal of not having to reinvent the wheel. After all, departures had been calculated for nearly two decades, and while imperfect

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sentence'") (quoting United States v. Hadash, 408 F.3d 1080, 1082 (8th Cir. 2005) (citation omitted)).

[141] *Jackson*, 467 F.3d at 839 (3d Cir. 2006).

[142] First, the sentencing judge calculates the Guidelines sentence. Second, the judge calculates any applicable departures. Third, the judge considers all the § 3553(a) factors to determine whether a "variance" or "non-guidelines" sentence is appropriate. *See, e.g.*, United States v. Gunter, 462 F.3d 237, 247 (3d Cir. 2006).

[143] *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 15 (2005) (statement of Ricardo Hinojosa, Chairman of the U.S. Sentencing Comm'n) ("The Commission believes that the *Booker* decision makes clear that the sentencing court must consider the guidelines and that such consideration necessarily requires the sentencing court to calculate the guideline sentencing range *and consider the departure policy statements* of the Federal sentencing guidelines." (emphasis added)).

[144] *Id.* ("[S]ubstantial weight to the guidelines" should be given "because as mandated by the Sentencing Reform Act, the Commission has considered the factors listed in section 3553(a) during the process of promulgating and refining the guidelines.").

[145] *See* United States Sentencing Commission, Public Hearing 5 (Feb. 15, 2005), *available at* http://www.ussc.gov/hearings/02_15_05/Transcript_15th.pdf (statement of Ricardo Hinojosa, Chairman, U.S. Sentencing Comm'n) ("The statute also requires that the sentencing court consider the policy statements within the guidelines, which obviously, include the departure statements in the guidelines.").

in many ways, much of the pre-*Booker* departure jurisprudence could at least provide insight into how courts should proceed under the advisory Guidelines.[146]

There are merits to this approach. Requiring judges to calculate the Guidelines, then calculate departures, then consider all the § 3553(a) factors requires careful consideration of the possibilities, and when put on paper, provides much-needed information for reviewing appellate courts and other courts considering sentencing a similarly-situated defendant. The benefits of this transparency have also been realized by defendants who have suffered upward departures that resulted from an improper departure calculation.[147] Thus, when courts require calculating the departure range as part of calculating the Guidelines, and this calculation is improper, the defendant may benefit from a remand.[148]

Furthermore, calculating departures as before *Booker* builds on what courts learned from nearly twenty years of sentencing with the Guidelines and departures from the Guidelines. Courts can utilize prior departure precedent to inform them in their decision-making.[149] In the case of family circumstances departures, which involve a fact-intensive inquiry, courts can look to the family situations of defendants who in the past were granted and were denied departures on that basis. For example, in *United States v. Selioutsky*, the Second Circuit remanded a district court decision to depart based on extraordinary family circumstances because they were not

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[146] And in the particular case of departures based on discouraged factors, such as family ties and responsibilities, while many of the decisions eschewed § 3553(a) analysis and focused on "extraordinariness," these decisions often did in fact reflect some of the relevant considerations that § 3553(a) commands. *See supra* note 15.

[147] *See, e.g.*, United States v. Wallace, 461 F.3d 15 (1st Cir. 2006). In *Wallace*, the First Circuit reaffirmed its prior decisions requiring appropriate determination of departures as an integral part of determining the guidelines sentencing range. *Id.* at 32. Interestingly, the government argued that the district court applied a variance to increase the defendant's sentence, not a departure, and thus, the sentence should only have been reviewed for reasonableness. *Id.* The First Circuit rejected this argument, found that that four of the six grounds for departure were improper, and remanded for resentencing. *Id.* at 44–45.

[148] It should be noted, however, that the First Circuit in *Wallace* did not reach the issue of reasonableness under § 3553(a) because the departure calculations were incorrect. If on remand the district judge departed upward for the permissible two grounds for departure and then found that considering § 3553(a) warranted a further increase in the sentence by way of a variance, and this sentence was found reasonable, the result would have been the same and the remand would have been a monumental waste of time. *See* discussion *infra* Part IV.B.2.

[149] *See, e.g.*, United States v. Gunter, 462 F.3d 237, 247 (3d Cir. 2006) (following the three-step process, including calculating the departures, and noting that pre-*Booker* precedent serves with "advisory force").

supported by adequate findings by the lower court.[150] The Second Circuit noted that the case for a family circumstances departure on the record was not strong and was informed by pre-*Booker* precedent from within the Circuit.[151] However, the remand sent the case back to the district court—the most appropriate place to find the facts necessary for a proper determination of whether the family circumstances in this case truly were extraordinary.[152]

Finally, there are other possible benefits to defendants facing a sentence in a circuit that recognizes the validity of both departures and variances. Most obviously, a defendant can claim that her family circumstances are extraordinary under pre-*Booker* circuit precedent, and in the alternative, assert that even if she doesn't quite meet the necessary burden for a pre-*Booker* departure, the court may still show leniency in the form of a variance.[153] This may be an appealing approach when the defendant does not quite meet the standard for several departures and asks the court to combine her circumstances for a variance.[154]

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[150] 409 F.3d 114, 129 (2d Cir. 2005).

[151] *Id.* at 119 (noting the Second Circuit has found extraordinary family circumstances in "especially compelling circumstances" and not found them where the family's needs could be met by other relatives (citing United States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992); United States v. Madrigal, 331 F.3d 258, 260 (2d Cir. 2003))).

[152] Yet the argument can be quite forcefully made that the focus on "extraordinariness" is misplaced and does not further (at least overtly) the purposes of sentencing outlined in § 3553(a). And, the district court could always grant the exact same sentence without additional findings of extraordinary family circumstances based on its power to issue a variance post-*Booker*. If such were the case, the remand again would have been unnecessary had the step requiring a proper determination of departures been eliminated and the district and appellate courts utilized § 3553(a) in fashioning a sentence and then reviewing it for reasonableness. *See infra* Parts IV.B.2, V.D.

[153] *See* United States v. McBride, 434 F.3d 470, 476 (2006). Judge Boyce Martin, Jr., put it this way:

> Under the mandatory Guideline system, a defendant's only hope of a lesser sentence was a Guideline-based downward departure. . . . Now, because the Guidelines are no longer mandatory and the district court need only consider them along with its analysis of the section 3553(a) factors, the decision to deny a Guidelines-based downward departure is a smaller factor in the sentencing calculus. Furthermore, many of the very factors that used to be grounds for a departure under the Guidelines are now considered by the district court—with greater latitude—under section 3553(a).

Id. But see Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2005/02/departures_vari.html (Feb. 17, 2005, 2:50 EST) ("Though it might seem sensible to always first pitch for a departure, and then seek a variance as a fall-back position, counsel might risk losing credibility or placing emphasis on less helpful factors by putting greater focus on a departure claim than a variance claim.").

[154] *See, e.g.*, United States v. Holz, 118 Fed. Appx. 928, 940–41 (6th Cir. 2004) (unpublished) (weighing family circumstances and business impact and concluding that

Outside the family circumstances context, one example of the granting of a variance in lieu of a departure in a circuit that considers departure calculations part of the Guidelines calculations is *United States v. Williams*.[155] The district court in *Williams* calculated the Guidelines, including a career offender enhancement and a three-level downward departure for acceptance of responsibility. After this calculation, the district court granted a sentence of 90 months rather than anywhere between the Guidelines range of 188 to 235 months.[156] The government appealed the sentence, claiming that it was unreasonable, that the district court did not properly consider § 3553(a) factors, and that the reduced sentence could not be a proper granting of a downward departure for overrepresentation of criminal history.[157] However, the Eleventh Circuit affirmed the sentence as reasonable.[158] The court specifically mentioned a "district court's sentence does not have to be justified as a downward departure. After *Booker*, the Sentencing Guidelines are advisory, and the sentencing court, in its own discretion, can move below the advisory Guidelines range without a motion for downward departure as long as the resulting sentence is reasonable."[159] In other words, the Eleventh Circuit recognized the validity and availability of variances post-*Booker*, even when a downward departure for the same factor would not be granted. This shows that circuits maintaining the relevance of departures post-*Booker* have not precluded defendants from the benefits of receiving a variance. Indeed, defendants in these jurisdictions can argue for both.

"taken together" the case was exceptional and a departure was warranted). The court also noted § 5K2.0 cmt. n.3(c) which states:

> [i]f two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

USSG § 5K2.0 cmt. n.3(c). *See also* United States v. Marine, 94 F. App'x. 307, 311 (6th Cir. 2004) (departing downward because while none of the family circumstances were exceptional when considered alone, the whole situation was exceptional when considered together).

[155] 435 F.3d 1350 (11th Cir. 2006).

[156] *Id.* at 1353.

[157] *Id.* at 1354 n.2.

[158] *Id.* at 1355.

[159] *Id.* at 1354 n.2.

2. *The Minority Approach: Departures Are Obsolete*

The glaring reality of decisions like *Williams* is that a § 3553(a) variance trumps a decision to depart. In other words, even if a traditional departure is not warranted under pre-*Booker* precedent, a judge may still grant a variance as long as the variance is steeped in the purposes of § 3553(a) and is considered reasonable on appeal. This is *Booker*'s fundamental command.[160] Granted, following pre-*Booker* departures will *usually* comply with § 3553(a)'s aims and will be reasonable. The point is that departures, while *often* reflecting the purposes of punishment outlined in § 3553(a), do not *always* guarantee such compliance. And if an appellate court is reviewing a sentence for compliance with § 3553(a), it seems logical that the district court would justify its sentences primarily in the language of § 3553(a). There is strong anecdotal evidence that this has been the case since *Booker*, and it appears this trend is gaining momentum. But this slow, ad-hoc evolution would benefit from the Commission's candor in recognizing that departures have been replaced by post-*Booker* variances.

Thus far, only the Seventh Circuit has emphatically declared departures to be obsolete in the wake of *Booker*.[161] The Ninth Circuit, while not as bold, has noted the redundancy that departure calculations entail.[162] Oddly, the Seventh Circuit has not provided an extended discussion or much rationale for such a break from the majority. Only the Ninth Circuit in *Mohamed* has provided a clear and extended discussion as to why departures should no longer be required.

In *Johnson*, the Seventh Circuit declared that the "framing of the issue as one about 'departures' has been rendered obsolete."[163] The *Johnson* court's basis for departure obsolescence was *Booker*'s demand that sentences withstand review for reasonableness.[164] It is possible that the impetus for this

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[160] This is further supported by both *Gall* and *Kimbrough*. In *Gall*, the district court had in part based its variance on age, family ties, and community ties without asserting that these discouraged factors were present to any unusual or exceptional degree according to the Guidelines. *See* Gall v. United States, 128 S. Ct. 586, 608–09 (2007) (Alito, J., dissenting). Nevertheless, the Supreme Court held that this variance was reasonable. In *Kimbrough*, although the district court judge based his downward variance in part on his personal disagreement with crack cocaine sentencing policy, the Supreme Court held that this variance was reasonable, in part because § 3553(a) instructs district courts to sentence sufficiently, but not greater than necessary. *See* Kimbrough v. United States, 128 S. Ct. 558, 560 (2007).

[161] United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2006).

[162] United States v. Mohamed, 459 F.3d 979, 986–87 (9th Cir. 2006).

[163] *Johnson*, 427 F.3d at 426.

[164] *Id.* ("It is now clear that after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker*

pronouncement was the very fear that courts would simply "collapse the departure and variance considerations" for want of proceeding with "the hard doctrinal work of deciding whether a case is sufficiently exceptional to justify a departure."[165] And even post-*Rita*, where a rebuttable presumption of reasonableness for a within-guidelines sentence is permissible—but truly rebuttable—Judge Posner on the Seventh Circuit has called appealing a within-Guidelines sentence "frivolous,"[166] suggesting maybe the Seventh Circuit doesn't want to engage in the hard doctrinal work. But consolidating steps two and three of the three-step sentencing process cuts both ways. Where a traditional departure may be unjustified but a variance is reasonable, skipping to a § 3553(a)-based variance will benefit the defendant and serve the interests of judicial economy.

The Ninth Circuit largely agreed with the views of the Seventh Circuit in *United States v. Mohamed*.[167] The *Mohamed* court noted that calculating departures and then wading through the § 3553(a) factors to determine a reasonable sentence was "redundant."[168] And while a majority of circuits continue to calculate departures as was done prior to *Booker*, the *Mohamed* court correctly noted that these courts' decisions are not in complete agreement. For instance, appellate review of departure calculations varies from the de novo standard of review, to abuse of discretion, to reasonableness.[169] Because *Booker* mandated reasonableness review, the Ninth Circuit has decided to review decisions to grant a reduced sentence under this standard as well—regardless of whether the district court imposes a departure or a variance.[170]

Significantly, however, the *Mohamed* court noted its holding was not "mean[t] to suggest . . . that the pre-*Booker* system of departures should be ignored."[171] Indeed, if a district court were now to exercise its discretion for reasons that permitted a departure "under the pre-*Booker* system of departures, such overlap may suggest that the sentencing decision was

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decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory.").

[165] Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2005/02/departures_vari.html (Feb. 17, 2005, 2:50 EST).

[166] United States v. Gammicchia, 498 F.3d 467, 468 (7th Cir. 2007).

[167] 459 F.3d 979, 986 (9th Cir. 2006).

[168] *Id.*

[169] *Id.* at 987. The Eleventh Circuit applied de novo review in *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005); the Second Circuit applied an abuse of discretion standard in *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005); and the Sixth Circuit applied the reasonableness standard in *United States v. Jackson*, 408 F.3d 301, 304 (6th Cir. 2005).

[170] *Mohamed*, 459 F.3d at 986.

[171] *Id.* at 987.

reasonable."[172] Thus, the Ninth Circuit candidly noted "out of a recognition that the concept of formal departures has become anachronistic, we hold that any deviation from the applicable advisory guidelines range will be viewed as an exercise of the district court's post-*Booker* discretion and reviewed only for reasonableness."[173]

Thus, the Ninth Circuit has not completely "abandoned" departures. But the force of the *Mohamed* opinion still stands. Even if a sentencing judge departs under the pre-*Booker* framework, the unmistakable fact is that the appellate court must review the decision in light of *Booker*. The decision to depart will only be upheld if the district court considered the § 3553(a) factors and was reasonable in its determination. Therefore, both the Seventh and Ninth Circuits recognize that post-*Booker*, the sentencing process no longer requires the formal calculation of departures from the Guidelines.

V. WHY DEPARTURE OBSOLESCENCE WILL LEAD TO MORE PRINCIPLED, PURPOSEFUL SENTENCING

Because the Seventh Circuit has failed to justify its position and the Ninth Circuit has been less daring than this Note advocates, this Part outlines why departure obsolescence is proper and how this framework can be implemented. On the whole, departures should be discarded for two main reasons: (1) the justifications for why we still adhere to departures are largely deficient; and (2) variances more faithfully comply with *Booker*'s § 3553(a) mandate while giving judges the flexibility that departures do not provide.[174]

A. *Pre-*Booker *Departure Jurisprudence Does Not Appropriately "Inform" Post-*Booker *Sentencing Decisions*

One reason why courts have clung to departure decisions rendered prior to *Booker* is that these cases supposedly "inform" courts now deciding whether a departure should be granted or not.[175] While *Booker* did not render

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[172] *Id.*

[173] *Id.*

[174] Again, this appears to be just what the Supreme Court has meant in *Gall* and *Kimbrough*. The Guidelines were a great idea but they promoted too much consistency; that is, they did not allow for meaningful tailoring of sentences to deserving individuals. Now we have a system of advisory Guidelines that provides a benchmark, but district courts have more discretion to vary sentences than before *Booker*. The end result may be the best of both worlds.

[175] *See, e.g.*, United States v. Jackson, 467 F.3d 834, 839 (3d Cir. 2006); *see also* United States v. King, 454 F.3d 187, 196 (3d Cir. 2006) ("Nevertheless, we emphasize that the sentencing courts in this Circuit should continue to follow the requirement to

past departure decisions meaningless, it refocused the sentencing inquiry on the § 3553(a) factors—and these factors are largely absent from departure decisions rendered prior to 2005. This is especially true of departures based on "discouraged" factors where most sentences were justified on the "extraordinariness" of the defendant's situation. Yet Congress was clear when enacting the SRA that the Commission was to "establish sentencing policies and practices" that would meet "the purposes of sentencing as set forth in section 3553(a)(2)."[176]

While continuing to require departure calculations does not necessarily mean that courts will continue to apply failed pre-*Booker* precedents, the results suggest this has sometimes been the case.[177] If district courts were to now calculate sentencing adjustments by revisiting pre-*Booker* departure decisions in light of § 3553(a) factors, the problem would largely be alleviated. And in truth, the renewed focus on § 3553(a) across the board in post-*Booker* decisions has been encouraging. However, courts are sometimes applying the purposeless departures of old and often only considering § 3553(a) *ex post*, which can lead to sentencing outcomes still focused on "extraordinariness," albeit with a § 3553(a) gloss.[178] Abandoning departures altogether will rid the sentencing inquiry of the unworkable and purposeless departure jurisprudence that was the hallmark of pre-*Booker* sentencing and replace it with the heretofore elusive goal of purposeful punishments.

Moreover, immediately moving from the Guidelines calculation to the § 3553(a) inquiry recognizes the latter's primacy and properly focuses the

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'consider' the Guidelines . . . including formally ruling on . . . a departure . . . taking into account this Circuit's pre-*Booker* caselaw, which continues to have advisory force.").

[176] 28 U.S.C. § 991(b)(1)(A) (1988). 18 U.S.C. § 3553(a)(2) specifically "instructs judges to consider four traditional purposes when imposing a sentence: respect for law and just punishment, adequate deterrence, protection from further crimes by the defendant, and rehabilitation." Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 417 (1993) (citing 18 U.S.C. § 3553(a)(2) (2000)).

[177] *See, e.g.*, United States v. Selioutsky, 409 F.3d 114, 119 (2d Cir. 2005) (citing pre-*Booker* Second Circuit decisions to serve as guideposts for when family circumstances are exceptional and when they are not); *see also*, United States v. Crawford, 407 F.3d 1174, 1181–83 (11th Cir. 2005) (rejecting the district court's determination that, in the aggregate, the facts warranted a downward departure because several, though not all, of the grounds were impermissible grounds for departure prior to *Booker*).

[178] One notable exception has been *United States v. Husein*, 478 F.3d 318 (6th Cir. 2007). In *Husein*, while the Sixth Circuit continued its adherence to departure calculations, the court considered section 5H1.6 of the Sentencing Guidelines in light of § 3553(a) factors in a decidedly post-*Booker* way. *Id.* at 325–40. Aside from the continued adherence to departures, the purposeful and principled inquiry the court undertook in this case is precisely the kind advocated in this Note. But because this kind of analysis has been the exception rather than the rule post-*Booker*, *Husein* does not undercut the thrust of this Note.

sentencing determination on the purposes of punishment. This does not mean that pre-*Booker* departure decisions may not instruct the sentencing process.[179] But it does mean that the resulting body of sentencing law will carry out the desires of the SRA and provide illustrative—and purposeful—examples to other sentencing courts, rather than miring itself in inquiries about "extraordinariness." Therefore, whereas departure jurisprudence prior to *Booker* lacked a principled commitment to § 3553(a), that should not excuse courts from doing so now. Indeed, *Booker*'s renewed focus on § 3553(a) factors provides just the opportunity for sentencing courts and appellate courts on review to get it right.[180]

B. *Variances Are Superior to Departures*

For a single defendant, a departure and a variance are just two different tickets to the same place. But the method of judicial deliberation in granting a variance is much healthier for the federal sentencing system. The concept of departures is inextricably linked to the heady optimism associated with the mandatory Guidelines. The fact that the Commission intended to encapsulate nearly every possible circumstance that would present itself to a court—as noble as it was ambitious—proved too lofty a goal. The success of the Guidelines was supposed to rest on guided decision making, but ultimately, we ended up with grid decision making. The success of the system now in place owes less to the advisory force of the Guidelines and more to the systemic pliability injected by variances.

Much of the time, the Guidelines range produces a sentence that is reasonable. And while many departures reflect the wisdom and expertise of the Commission's calculated study, their use often results in a judge's limited ability to craft a sentence appropriately distant from a Guidelines calculation.

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[179] As the Ninth Circuit recognized in *United States v. Mohamed*, a variance based on grounds recognized as a valid departure prior to *Booker* may illustrate a sentence's reasonableness. 459 F.3d 979, 987 (9th Cir. 2006).

[180] One commentator suggested the benefits of purposeful sentencing practices nearly fifteen years ago:

> If federal courts considered purposes at sentencing, they might reintroduce the concept of purposes to the entire system, provide needed flexibility and individualization, introduce an engine for experimentation and further reform, and invite further theoretical and experimental exploration of the ends of sentencing. A similar view of the judge's role might be taken in state guideline systems or in nonguideline sentencing systems. The federal system serves as the starting point in this analysis of the judge's role, but the recommendation that judges find purposes *at* sentencing is intended to apply to other sentencing systems as well.

Miller, *supra* note 176, at 418. This seems particularly poignant given the state of sentencing law post-*Booker* and post-*Blakely*.

Variances, on the other hand, enable judges to judge. And because they must be grounded in § 3553(a) and are subject to appellate reasonableness review, they do not run the risk of a return to the days of unfettered discretion.[181] Perhaps the post-*Booker* concept of variances may not have been possible in the original Guidelines. Perhaps the pendulum had to swing from too much discretion to too little before we could arrive at the system now in place. Regardless, the result is that departures are unnecessary because they cannot compete with the efficacy of variances.

C. *Considering the Guidelines Without Calculating Departures Will Not Lead to Unchecked Judicial Discretion*

The Guidelines were enacted to rein in the unchecked power of judicial discretion that resulted in unwarranted sentencing disparity.[182] Requiring district courts to calculate the Guidelines range prior to *Booker* largely succeeded in eliminating disparity. But part of the Guidelines' failure was that they were *too* rigid. Continuing to require district courts to calculate and consider the Guidelines sentencing range post-*Booker*, even without calculating possible departures, still provides district courts in sentencing, and appellate courts on review, with a starting point. This starting point is a measuring stick against which the ultimate sentence, on appeal, can be judged for reasonableness. Because the Guidelines calculation, even without the departure calculation, will be the same no matter where a defendant is sentenced, the purpose of checking judicial discretion will still be served when the sentencing determination begins with the Guidelines sentencing range.

D. *Abandoning Departures Will Promote Clarity and Efficiency*

The approach advocated in this Note requires two steps in the sentencing process, rather than three. This approach provides a simpler way to arrive at an ultimate sentence in what can be a very difficult process. Additionally, recognizing the obsolescence of departures eliminates the redundancy and

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[181] For example, in *United States v. Wachowiak*, the Seventh Circuit upheld a seventy-month sentence as reasonable even when the Guidelines suggested 121–151 months. 496 F.3d 744, 745 (7th Cir. 2007). The Seventh Circuit noted Judge Adelman's sentence properly considered factors under § 3553(a) that were not adequately factored into the Guidelines calculation. One such factor was the highly unusual recommendation by the probation office that the defendant "receive a sentence significantly below the guidelines range." *Id.* at 747.

[182] *See* Berman, *supra* note 10, at 40.

inefficiencies that result from the three-step process.[183] Furthermore, if a district court improperly calculates a departure and is reversed for misapplication of "the Guidelines" on appeal, the sentencing judge still would be free on remand to impose exactly the same sentence by exercising his discretion under the now-advisory guidelines. Such a sentence would then be reviewed for reasonableness, in which case it is the review for reasonableness, and not the validity of the so-called departure, that determines whether the sentence stands.[184]

While this rationale was not adopted by the Eighth Circuit in *United States v. Hawk Wing*, the concurring opinion in that case would have adopted it because requiring departure calculations "unduly complicates our appellate task and may compel a significant number of essentially meaningless remands."[185]

Finally, skipping the departure calculation results in analytical clarity that has been lacking in this area since the Guidelines were enacted. By declaring departures obsolete, a judge must calculate and consult the Guidelines sentencing range and determine if the sentence should be varied in light of § 3553(a). Injecting another step in the process (the departure calculation) is redundant as the judge will necessarily determine whether a variance in light of § 3553(a) is warranted regardless of the result of the departure calculation. Of course, even without requiring calculation of departures, they still may remain relevant considerations for variances. Yet the ultimate sentencing determination must be in line with the purposes of sentencing, not with the purposeless departure jurisprudence of old.

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[183] *See* United States v. Mohamed, 459 F.3d 979, 986–87 (9th Cir. 2006) ("[T]o require two exercises—one to calculate what departure would be allowable under the old mandatory scheme and then to go through much the same exercise to arrive at a reasonable sentence—is redundant.").

[184] *Id.* at 987. This futility of departures is also illustrated under the harmless error doctrine. If an improper departure were harmless and the sentence reasonable, the improper departure would be harmless and the sentence upheld. *Id.* If the sentence were unreasonable, the appellate court would reverse because the departure was improper and because the sentence was unreasonable. Thus, the calculation of the departure is always trumped by the bottom line: was the sentence reasonable or not. *Id.*

[185] United States v. Hawk Wing, 433 F.3d 622, 633 (8th Cir. 2006) (Loken, J., concurring) ("[M]any departure rules under the mandatory guidelines have little or no practical impact on sentencing under the post-*Booker* advisory guidelines. In determining whether to remand under § 3742(f)(1) because of 'an incorrect application of the sentencing guidelines,' I would deem any such violations of those rules to be harmless error.").

E. *The Feeney Amendment Debate Supports Departure Obsolescence*

It is also worthwhile to reiterate that the Feeney Amendment, in its original form, proposed abolishing departures altogether. The ensuing discussion of the validity and merits of departures reveals that they were controversial and there was no consensus as to whether they should exist at all, or at least to what extent they should exist if kept in place. Clinging to the old framework of departures only perpetuates the uncertainty and tension that was the hallmark of jurisprudence prior to *Booker*.[186]

F. *Implementing the New Framework*

Ideally the Commission will take up the task of discarding departures. First, the Commission is an "expert body," who performs "precisely the sort of intricate, labor-intensive task[s] for which delegation . . . is especially appropriate."[187] Second, the Commission is insulated from the "distorting pressures of politics" that would hinder Congress from implementing such a change.[188] But the Commission would also have the legitimacy that many may believe would be lacking if the Supreme Court were to declare departures obsolete. By drawing on its unique composition of experts in the field of sentencing, and acknowledging that the departure framework was unworkable and incoherent prior to *Booker*, the Commission should rewrite Chapter Five of the Guidelines.

While some departures have never been controversial (e.g., section 5K1.1 for substantial assistance to the authorities), even if they were abandoned, identical variances may still be awarded. Yet even if uncontroversial departures are preserved, the section 5H factors, particularly those that were considered "not ordinarily relevant" under the mandatory Guidelines, should now be considered in light of the advisory Guidelines system. Because the pre-*Booker* focus on extraordinariness for these factors was far from ideal, the Commission should delete them altogether. Or, less drastically, the Commission could at least recognize that "not ordinarily relevant" factors such as family circumstances under section 5H1.6 could still be considered "discouraged" grounds for a reduced sentence in general.

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[186] Furthermore, the Commission's post-Feeney Amendments to the Guidelines altered many of the departures that were kept in tact. Many post-*Booker* departure decisions have given short shrift to the impact of these amendments or have failed to consider their significance altogether. *But see* United States v. Husein, 478 F.3d 318, 325–26 (6th Cir. 2007) (noting explicitly the PROTECT Act and the fundamental changes the Feeney Amendment wrought on the Guidelines just prior to *Booker*).

[187] Mistretta v. United States, 488 U.S. 361, 379 (1989).

[188] Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1324 (2005).

But the policy statements should be amended to explicitly mention that what is at stake now is not the degree of "extraordinariness," but rather, whether a reduced sentence would more accurately reflect the purposes of punishment as mentioned in § 3553(a). In the alternative, the Commission could overhaul all departures and get rid of the "discouraged factor" moniker or the "not ordinarily relevant" language that led to the purposeless and incoherent departure jurisprudence. This would ensure that judicial discretion does not run rampant, while at the same time recognizing that a sentencing judge should justify and anchor a reduced sentence in the purposes of punishment. This will enable appellate courts to review the sentence for reasonableness and will inject the requisite flexibility to make sentencing under the advisory Guidelines transparent, purposeful, and guided.

VI. CONCLUSION

Although only a distinct minority of courts has determined that departures are obsolete post-*Booker*, and these decisions contain limited insight to the benefits of such an approach, this is the better way forward. The series of events that led to overly-rigid Guidelines and *Booker*'s two-opinion mandate that the Guidelines are now "mandatorily advisory" was not the most direct way to achieve greater sentencing uniformity while maintaining enough judicial discretion to make the system viable. However, the system in place now is far superior to the inflexible, mandatory Guidelines system of old. This system will further improve when sentencing determinations are focused on the purposes of sentencing and punishment as outlined in § 3553(a). Declaring departures obsolete will be a strong step in this direction.